Dr Che Abdul Daim bin Hj Zainuddin & Ors v Suruhanjaya Pencegahan Rasuah Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–8–01 OF 2024
WAN AHMAD FARID J
27 MARCH 2024

Criminal Procedure — Criminal investigations — Judicial review of — Whether acts/omissions of investigative bodies in course of carrying out criminal investigations were judicially reviewable — Whether for judicial review to be applicable, applicant had to show investigating officers had acted mala fide — Whether allegation that investigations were politically motivated or that criminal charges framed against parties investigated were invalid were unfit to be raised in a judicial review setting and should be proved by evidence at trial — Whether applicants had not shown arguable case on their substantive judicial review application in order for leave to be granted

The first applicant ('A1') was a former Finance Minister of Malaysia and a wealthy businessman. The second applicant ('A2') was A1's wife. The third to sixth applicants were his children. The seventh applicant was Ilham Tower Sdn Bhd, which owned the 60-storey Ilham Tower in Kuala Lumpur which A1 had built. In early 2023, the first respondent ('MACC') initiated various investigative procedures against the applicants under the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). During the course of the investigations, MACC recorded statements from the applicants with regard to their assets and sources of income and the source of funds for the construction of Ilham Tower, froze their personal bank accounts and the bank accounts of their companies and conducted searches and seizures of properties and documents related to them. The second respondent (the public prosecutor) caused A1 and A2 to be charged in the sessions court for willfully submitting sworn statements which did not comply with the terms of s 36(1) of the MACC Act. In the instant application for leave to file judicial review proceedings against the actions taken by the respondents, the applicants sought: (a) a declaration that MACC and its officers had no reasonable cause to investigate them for a prosecution for any offence under the MACC Act or AMLA; (b) an order that MACC and its officers forthwith return to the applicants all documents that were seized or taken from them; and (c) an order that the s 36(1) MACC Act charges against A1 and A2 be quashed. In his affidavit in support of the leave application, A1 contended that despite his several requests, MACC had refused to disclose the nature of the complaint that had caused them to commence investigations

against the applicants. A1 pointed out that he had ceased being an officer of a public body since 2001 and that Ilham Tower was built long after that, ie, between 2009 and 2015. A1 alleged that the investigations against the applicants were politically-motivated and a 'fishing expedition' since no reasonable grounds for the investigations was disclosed. A1 argued that investigative bodies should conduct their investigations fairly and speedily and not more than 20 years after an alleged offence had been committed and that although the law allowed the public prosecutor the power to institute or withdraw a criminal charge at his discretion, the exercise of that power was not absolute but could be challenged in a judicial review proceeding.

Held, dismissing the leave application:

(1) As a general rule, an exercise of power in the course of a criminal investigation was not open to judicial review. However, one way to challenge the criminal investigation was by establishing mala fide on the part of the investigation officers (see Federal Court's pronouncements in *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2017] 5 MLJ 349). A1's affidavit did not disclose any allegation or evidence to suggest any mala fide on the part of the investigation officers of the MACC in the conduct of their investigations against the applicants. Mere suspicion of mala fide or even an allegation of intimidation or harassment was insufficient to amount to mala fide (see paras 60–61, 65–66 & 77).

(2) The allegation that the notices issued by the MACC were unlawful was insufficient to establish mala fide. Whether or not the issuance of such notices was unlawful was a moot point. It was a matter of interpretation. There was respectable authority to state that the adoption of a different interpretation of the law (by the MACC in this context) did not amount to an error of law that was amenable to judicial review (see para 67).

(3) As held by the Federal Court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, the decisions taken by the public prosecutor/Attorney-General under art 145(3) of the Federal Constitution were cloaked with the presumption of legality. One had to establish compelling prima evidence to challenge such decisions in a judicial review proceeding (see paras 62–64).

(4) As to whether it was proper to investigate an alleged offence committed more than 20 years ago, the maxim that time did not run against the Crown applied. The defence that the alleged offence was stale was unknown to our criminal law (see para 68).

(5) There was no merit in the argument that the investigation against the applicants offended art 7(1) of the Federal Constitution on the

protection against retrospective criminal laws in view of the saving clause in s 74(3) of the MACC Act which repealed the Anti-Corruption Act 1997 (see paras 69 & 77).

(6) The allegation that the investigation against the applicants was politically motivated or mala fide was a question of fact that should be proved by evidence at the criminal trial and not raised by affidavit evidence in a judicial review proceeding. Similarly, since A1 and A2 had already been charged in the sessions court, they should challenge their charges via a criminal application and not collaterally in a judicial review (see paras 70–76).

(7) The applicants did not disclose any arguable case in their substantive judicial review application for grant of the reliefs sought, if leave was granted. In the circumstances, the grant of leave would be an exercise in futility (see para 79).

[Bahasa Malaysia summary

Pemohon pertama ('A1') adalah bekas Menteri Kewangan Malaysia dan ahli perniagaan berada. Pemohon kedua ('A2') adalah isteri A1. Pemohon ketiga hingga keenam adalah anak-anaknya. Pemohon ketujuh adalah Ilham Tower Sdn Bhd, yang memiliki Menara Ilham 60 tingkat di Kuala Lumpur yang telah dibina oleh A1. Pada awal 2023, responden pertama ('SPRM') memulakan pelbagai prosedur penyiasatan terhadap pemohon di bawah Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') dan Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLATFPUAA'). Semasa penyiasatan dijalankan, SPRM merekodkan kenyatan daripada pemohon berhubung aset dan sumber pendapatan mereka dan sumber dana untuk pembinaan Menara Ilham, membekukan akaun bank peribadi mereka dan akaun bank syarikat mereka dan menjalankan carian dan rampasan harta dan dokumen yang berkaitan dengannya. Responden kedua (pendakwa raya) menyebabkan A1 dan A2 didakwa di mahkamah sesyen kerana dengan sengaja mengemukakan akuan bersumpah yang tidak mematuhi terma s 36(1) Akta SPRM. Dalam permohonan semasa untuk kebenaran memfailkan prosiding semakan kehakiman terhadap tindakan yang diambil oleh responden, pemohon memohon: (a) pengisytiharan bahawa SPRM dan pegawainya tidak mempunyai sebab munasabah untuk menyiasat mereka bagi pendakwaan bagi sebarang kesalahan di bawah Akta SPRM atau AMLATFPUAA; (b) satu perintah supaya SPRM dan pegawainya segera mengembalikan kepada pemohon semua dokumen yang disita atau diambil daripada mereka; dan (c) satu perintah supaya s 36(1) Akta SPRM supaya pendakwaan terhadap A1 dan A2 dibatalkan. Dalam afidavitnya menyokong permohonan kebenaran itu, A1 menegaskan walaupun beberapa permintaannya, SPRM enggan mendedahkan jenis aduan yang menyebabkan mereka memulakan siasatan terhadap pemohon. A1 menegaskan bahawa dia telah berhenti menjadi

pegawai badan awam sejak 2001 dan Menara Ilham telah dibina lama selepas itu, iaitu, antara 2009 dan 2015. A1 mendakwa bahawa siasatan terhadap pemohon adalah bermotifkan politik dan 'fishing expedition' memandangkan tiada alasan munasabah untuk penyiasatan itu didedahkan. A1 berhujah bahawa badan penyiasat harus menjalankan penyiasatan mereka dengan adil dan pantas dan tidak lebih daripada 20 tahun selepas kesalahan yang dikatakan telah dilakukan dan walaupun undang-undang membenarkan pendakwa raya kuasa untuk memulakan atau menarik balik pertuduhan jenayah mengikut budi bicaranya, pelaksanaan kuasa itu tidak mutlak tetapi boleh dicabar dalam prosiding semakan kehakiman.

Diputuskan, menolak permohonan kebenaran:

(1) Sebagai peraturan am, penggunaan kuasa semasa penyiasatan jenayah tidak terbuka kepada semakan kehakiman. Walau bagaimanapun, satu cara untuk mencabar siasatan jenayah adalah dengan mewujudkan mala fide di pihak pegawai penyiasat (lihat kenyataan Mahkamah Persekutuan dalam *Suruhanjaya Pencegahan Rasuah Malaysia & Ors lwn Latheefa Beebi Koya & Anor* [2017] 5 MLJ 349). Afidavit A1 tidak mendedahkan sebarang dakwaan atau bukti yang menunjukkan sebarang mala fide di pihak pegawai penyiasat SPRM dalam menjalankan siasatan mereka terhadap pemohon. Sekadar syak wasangka mala fide atau dakwaan intimidasi atau gangguan tidak mencukupi untuk terjumlah kepada mala fide (lihat perenggan 60–61, 65–66 & 77).

(2) Dakwaan bahawa notis yang dikeluarkan oleh SPRM adalah menyalahi undang-undang adalah tidak mencukupi untuk mewujudkan mala fide. Sama ada pengeluaran notis tersebut menyalahi undang-undang atau tidak adalah perkara yang dipertikaikan. Ia adalah soal tafsiran. Terdapat otoriti yang sahih untuk menyatakan bahawa penggunaan tafsiran undang-undang yang berbeza (oleh SPRM dalam konteks ini) tidak membawa kepada kesilapan undang-undang yang boleh diterima pakai untuk semakan kehakiman (lihat perenggan 67).

(3) Seperti yang diputuskan oleh Mahkamah Persekutuan dalam *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, keputusan yang diambil oleh Pendakwa Raya/Peguam Negara di bawah perkara 145(3) Perlembagaan Persekutuan adalah diselubungi dengan anggapan sah. Seseorang itu perlu mewujudkan keterangan prima yang kuat untuk mencabar keputusan sedemikian dalam prosiding semakan kehakiman (lihat perenggan 62–64).

(4) Sama ada wajar untuk menyiasat kesalahan yang didakwa dilakukan lebih daripada 20 tahun yang lalu, maksim bahawa time did not run against the Crown terpakai. Pembelaan bahawa kesalahan yang didakwa itu lapuk tidak diakui oleh undang-undang jenayah kita (lihat perenggan 68).

(5) Tiada merit dalam hujah bahawa penyiasatan terhadap pemohon bertentangan perkara 7(1) Perlembagaan Persekutuan mengenai perlindungan terhadap undang-undang jenayah retrospektif memandangkan klausa penyelamat dalam s 74(3) Akta SPRM yang memansuhkan Akta Pencegahan Rasuah 1997 (lihat perenggan 69 & 77).

(6) Dakwaan bahawa penyiasatan terhadap pemohon adalah bermotifkan politik atau mala fide adalah persoalan fakta yang harus dibuktikan melalui keterangan pada perbicaraan jenayah dan tidak dibangkitkan melalui keterangan afidavit dalam prosiding semakan kehakiman. Begitu juga, memandangkan A1 dan A2 telah pun didakwa di mahkamah sesyen, mereka harus mencabar pertuduhan mereka melalui permohonan jenayah dan bukan secara cagaran dalam semakan kehakiman (lihat perenggan 70–76).

(7) Pemohon tidak mendedahkan apa-apa kes yang boleh dibicarakan dalam permohonan semakan kehakiman substantif mereka untuk memberikan relif yang diminta, jika kebenaran diberikan. Dalam keadaan ini, pemberian kebenaran akan menjadi sia-sia (lihat perenggan 79).]

Cases referred to

City Growth Sdn Bhd & Anor v The Government of Malaysia [2006] 1 MLJ 581, HC (refd)

Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829, FC (refd)

Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] supp MLJ 16, FC (folld)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)

Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114, CA (folld)

Ong Lock Mui v Deputy PP [1972] 1 MLJ 73 (refd)

PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421, FC (refd)

PP v Mark Koding [1983] 1 MLJ 111 (refd)

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (refd)

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor [2017] 5 MLJ 349, FC (folld)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 53, HC (refd)

Vakil Prasad Singh v State of Bihar [2009] INSC 156, SC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009)
Anti-Money Laundering, Anti-Terrorism Finance and Proceeds of Unlawful Activities Act 2001 ss 4(1), 44, 44(1), 50(1)
Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013) s 97(1)
Constitution of India [IND] art 21
Criminal Procedure Code ss 5, 376(1)
Federal Constitution arts 5(1), 7(1), 145, 145(3)
Malaysian Anti-Corruption Commission Act 2009 ss 23, 23(1), 29(4), 30(1), 30(1)(a), (1)(b), 33(1), 36(1), (1)(a), (1)(b), (2), 38(1), 74, 74(3)
Optical Discs Act 2000
Rules of Court 2012 O 53, O 53 r 3(2)
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 53 r 3

Tommy Thomas (with Mervyn Lai Wei Shiung, Rahayu Mumazaini, Alicia Gomez and Wong Ying Ying PDK) (Tommy Thomas) for the applicant.
Shamsul bin Bolhassan (with Liew Horng Bin and Nurul Muhaimin Mohd Azman) (Federal Counsel, Attorney General's Chambers) for the respondent.

Wan Ahmad Farid J:

THE PARTIES

[1] The first applicant is a practising advocate and solicitor and former Minister of Finance. He was also the treasurer of UMNO from 1984 until his resignation in 2001.

[2] The second applicant is the first applicant's wife. The third to sixth applicants are the first applicant's children.

[3] The seventh applicant, Ilham Tower Sdn Bhd, is the registered proprietor of 'Ilham Tower'. Ilham Tower is the subject matter of a notice of seizure issued pursuant to s 38(1) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act').

[4] The putative first respondent is the Malaysian Anti-Corruption Commission, a statutory body established under the MACC Act. The putative second respondent is the public prosecutor. Under s 376(1) of the Criminal Procedure Code ('the CPC'), the Attorney General shall be the public prosecutor and shall have control and direction of all criminal prosecutions and proceedings under the Code.

A THE FACTUAL BACKGROUND

[5] It is the first applicant's case that prior to joining politics and holding public office, he was a 'fairly successful and wealthy businessman'. According to the applicant, he had controlling or substantial interests in many public listed companies, which include various premier banks. His 10% stake in Nestle Malaysia alone is worth approximately RM3 billion.

[6] In short, before he joined politics, the first applicant always owned assets and properties locally and overseas since the 1970s through what he referred to as 'legitimate business activities'.

THE ANATOMY OF THE PANDORA PAPERS

[7] In 2021, an organisation known as the International Consortium of Investigative Journalists ('ICIJ') provided to the media outlets, including those in Malaysia, access to leaked confidential files. The confidential files revealed the owners of offshore companies in the jurisdiction, which may be referred to as 'tax havens'.

[8] The worldwide release became known as the 'Pandora Papers'.

[9] The offshore companies and assets listed in the Pandora Papers were also linked to the first applicant, his wife and children.

[10] This is how it all began.

[11] On 12 February 2023, the MACC sought and the first applicant gave a statement. Nothing happened immediately after that. It was only on 7 June 2023 that notices, pursuant to s 36(1)(a) of the MACC Act, were issued to the first to sixth applicants requiring information regarding their assets and sources of income. The MACC also sought information on the assets sent out from Malaysia from 1997 to date.

[12] Section 36(1)(a) provides as follows:

> Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner and above, if he has reasonable ground to believe, based on the investigation carried out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice —
>
> (a) require that person to furnish a statement in writing on oath or affirmation.

[13] Paragraph 2 of the notices states that the information required is to be

furnished within 30 days:

> Pernyataan bersumpah atau berikrar yang tersebut di atas hendaklah diserahkan sendiri atau dengan pos berdaftar kepada saya di alamat yang tersebut di atas dalam tempoh 30 hari dari tarikh penyampaian NOTIS ini kepada kamu.

[14] According to the notices, the Chief Commissioner of the MACC ('the Chief Commissioner') had reasonable cause to believe that an offence for gratification under s 23 of the MACC Act was committed based on investigations regarding a complaint referred to as No IPJ/RPTMO: 0145/2023 ('complaint'). Section 23(1) of the MACC Act provides that any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

[15] On the same day, 7 June 2023, the Chief Commissioner had caused the MACC to issue to the first and sixth applicants notices pursuant to s 44(1) of the Anti-Money Laundering, Anti-Terrorism Finance and Proceeds of Unlawful Activities Act 2001 ('the AMLA'). Section 44(1) of the AMLA, inter alia, provides that an enforcement agency, in this case, the MACC, may issue an order to freeze any property of any person, wherever the property may be, if an investigation with regard to an unlawful authority has commenced against that person and the enforcement agency has reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence.

[16] As a result of the notices under s 44(1) of the AMLA, the first to sixth applicants' personal bank accounts and the bank accounts of their companies were frozen.

[17] The first applicant's personal assistant was also served with a notice dated 7 June 2023 pursuant to s 30(1)(b) of the MACC Act requiring her to produce the first applicant's personal office planner and visitor log book from 2013 to date.

[18] On 3 July 2023, the applicants were served with a second s 36(1)(a) notices.

[19] The applicants, through their solicitors, had requested from the Chief Commissioner for them to be given an extension of time regarding compliance with the second s 36(1)(a) notices. The solicitors also intimated to the Chief Commissioner if they could be given the opportunity to make appropriate representations to the MACC regarding the allegations that were hitherto unbeknownst to the applicants.

[20] While the Chief Commissioner acceded to the request for an extension of time, he refused to disclose the nature of the complaint on the basis that the complaint was still in the midst of being investigated. In para 3 of his letter to the solicitors dated 4 August 2023, the Chief Commissioner states as follows:

> Berhubung dengan perenggan 3(c) surat tuan, untuk makluman Notis di bawah Seksyen 36(1)(a) Akta SPRM 2009 adalah diperuntukan di bawah Bahagian V Akta SPRM 2009 yang memberi kuasa kepada pegawai SPRM untuk menjalankan siasatan. Oleh itu, tiada keperluan untuk pihak SPRM mendedahkan butiran dalam aduan yang sedang dalam proses siasatan.

[21] Subsequently, the applicants were further served with the third and fourth notices under s 36(1)(a) of the MACC Act.

[22] Unperturbed, the first applicant, through his solicitors, again sought for the Chief Commissioner to reconsider his request that he be furnished with the allegations made in the complaint. The Chief Commissioner turned down the request on the ground that under s 29(4) of the MACC Act, the report shall be kept secret and shall not be disclosed by any person to any person other than officers of the Commission and the public prosecutor until an accused person has been charged in court.

[23] The first to the sixth applicants were subsequently served with the fifth and sixth notices under s 36(1)(a) dated 6 October 2023 and 8 November 2023, respectively.

[24] In view of the persistent refusal of the Chief Commissioner and MACC to accede to their request to make the representations on the complaint, the applicants were left with no choice but to comply with s 36(1)(a) notices. Accordingly, on 13 December 2023, the first to sixth applicants' solicitors submitted to the MACC their respective statements pursuant to s 36(1)(a) and (b) of the MACC Act.

ILHAM TOWER AND YAYASAN ILHAM

[25] Ilham Tower is a 60-storey building at No 8 Jalan Binjai, Kuala Lumpur, located on the piece of land known as Geran No 75830 Lot No 20002 Seksyen 63 ('Ilham Tower land').

[26] As alluded to earlier, Ilham Tower is managed and owned by Ilham Tower Sdn Bhd, the seventh applicant herein.

[27] There is another related entity, known as Yayasan Ilham, which is a non-profit company established for charity, including the promotion of arts,

culture and education in Malaysia. Yayasan Ilham's current board of directors includes the second, fifth and sixth applicants who are also its subscribers.

[28] By notices dated 18 December 2023 issued pursuant to s 30(1)(b) of the MACC Act and directed to one Harliza bt Harun of Shareworks Sdn Bhd ('Shareworks'). Shareworks is a company secretarial firm for Ilham Baru Sdn Bhd ('Ilham Baru'), Ilham Tower Sdn Bhd and Yayasan Ilham. Section 30(1)(b) provides that an officer of MACC investigating an offence under the section may:

> (b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerized data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence.

[29] The notices under s 30(1)(b) of the MACC Act required Harliza and Shareworks to produce four types of documents, the details of which are minutes books, secretarial files, annual returns and financial statements of 'Ilham Group of Companies' from 2015 to 2023. The first applicant, however, insisted that no such group exists.

[30] A further notice of search and seizure dated 18 December 2023 was issued under s 31(1) of the MACC Act, ordering, inter alia, the entering, finding and seizing of books, documents and inspection of persons at Shareworks' office. Section 31(1) empowers the public prosecutor or an officer of MACC with the rank of Chief Senior Assistant Commissioner if there is reasonable cause to suspect that, in any place, there is evidence of the commission of an offence under the MACC Act.

[31] It was also on the same day that the MACC seized Ilham Tower pursuant to a notice issued under s 38(1) of the MACC Act. Section 38(1) provides that where the public prosecutor is satisfied on information given to him by an officer of the MACC that any immovable property is the subject matter of an offence under the MACC Act or evidence of the commission of such offence, such property shall be liable to seizure.

[32] In addition to the notice under s 38(1), the MACC issued a further notice under s 31(1) of the MACC Act dated 18 December 2023 ordering the inspection and search of Ilham Tower and seizure of, inter alia, books and records within it. There were two notices issued by the MACC pursuant to s 30(1)(b) of the MACC Act to one Ooi Buk Soon, a consultant for maintenance in Ilham Tower Sdn Bhd. The notices required that the MACC be provided, inter alia, the following:

(a) documents relating to the construction of Ilham Tower;

A (b) the source of funds for the construction of Ilham Tower;

(c) the 2009 to 2021 general ledger and audited financial statements;

(d) the 2022 audited reports and bank account statements of Ilham Tower Sdn Bhd, Ilham Baru and Yayasan Ilham; and

B (e) loan agreement with Public Bank Bhd in relation to the construction of Ilham Tower.

THE FIRST APPLICANT'S CASE

C **[33]** The first applicant took umbrage in the manner in which the MACC conducted the investigation against him and the remaining applicants. His reason is this. According to the first applicant, even if we were to assume for one moment that the investigation was to be based on a potential offence under s 23 of the MACC Act, such an offence could only be committed, if at all, by an D officer of a public body. Section 23(1) provides that an officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

E **[34]** The first applicant asserted that he had held no office of a public body since 31 May 2001. In the circumstances, the first applicant contended that any alleged gratification could only have occurred prior thereto.

[35] According to the first applicant, what is perplexing is that the F documents sought by the MACC's numerous statutory notices relating to the construction of Ilham Tower could not have been related to any gratification offence. The first applicant asserted that the construction of Ilham Tower began in 2009 and was completed in 2015. It is for this reason that the first applicant believed that the MACC had ventured into a fishing expedition.

G **[36]** In any event, the first applicant took a particular offence in a media statement issued by the MACC dated 30 December 2023. The media release, inter alia, states as follows:

H (a) an investigation of the first applicant was initiated in February 2023 based on the information from the Pandora Papers; and

(b) the first applicant was being investigated under s 23 of the MACC Act and s 4(1) of the AMLA.

I **[37]** The first applicant also asserted that having ownership of off-shore companies and assets is not in itself an offence under either s 23 of the MACC Act or s 4(1) of the AMLA. In the circumstances, the first applicant insisted that it does not constitute 'reasonable grounds' that justify the issuance of the notices under ss 36(1), 38(1), 30(1), 33(1) of the MACC Act or s 44 of the

AMLA.

[38] In January 2024, the MACC officers arrived at the Ilham Tower seeking the production of documents relating to the acquisition of the Ilham Tower and Ilham Tower land. Various statutory notices under the MACC Act were issued against the officers of Ilham Tower, Yayasan Ilham, Yayasan Haji Zainuddin, Ilham Tower Sdn Bhd and Ilham Gallery, a public art gallery located at Ilham Tower, to produce documents listed in the respective notices.

[39] The MACC also issued a notice pursuant to s 30(1)(a) and (b) of the MACC Act to one Mok Yee Lee, the general manager of Element Hotel, located at Ilham Tower. In the said notice, the MACC required Encik Mok to provide details on the organisation and employee list at Element Hotel.

[40] On 3 January 2024, the MACC officers attended to the first applicant's previous residence at Taman Melawati armed with a search and seizure notice pursuant to s 31(1)(a) of the MACC Act. The first applicant's complaint is that the MACC took away a huge number of documents belonging to him without providing a detailed index list.

[41] In addition, the MACC also issued notices pursuant to 30(1)(a) of the MACC Act and s 44(1) of AMLA to one Ahmad Fadzil bin Ahmad Mustafa. Ahmad Fadzil, who was the caretaker of the Melawati house, witnessed the seizing of documents. The first applicant's vehicles at the Melawati house were also 'frozen' by the MACC.

[42] In short, the first applicant took exception to what he described as the continued 'harassment' on the part of the MACC officers on him and the remaining applicants. The harassment, according to the first applicant, smacks of political persecution. He cited an earlier media report attributed to Datuk Seri Anwar Ibrahim in July 2022. In the media report, Anwar Ibrahim was quoted as saying that the first applicant would have sleepless nights if he became Prime Minister.

THE APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

[43] Aggrieved by the actions of the putative respondents, the applicants commenced this application for leave for judicial review seeking, inter alia, for a declaration that the putative first respondent and its officers have no reasonable cause to investigate the first to sixth applicants, which would lead to a prosecution for any offence either under the MACC Act or AMLA.

[44] The applicants also sought an order of mandamus against the putative first respondent and its officers that all documents seized or obtained from its

investigation against the first applicant and his family members be returned to each of them within seven days from the order to be made in this judicial review application.

The development since the filing of the application for leave

[45] There has been a development since the filing of this application for leave.

[46] On 23 January 2024, the second applicant, Toh Puan Naimah, was charged before the Kuala Lumpur Sessions Court pursuant to s 36(2) of the MACC Act for allegedly wilfully submitting on 13 December 2023 a sworn statement which was not in compliance with the terms of s 36(1)(b) of the MACC Act.

[47] On 29 January 2024, the first applicant was charged before the Kuala Lumpur Sessions Court pursuant to s 36(2) of the MACC Act for allegedly wilfully submitting on 13 December 2023 a sworn statement which was not in compliance with the terms of s 36(1)(a) of the MACC Act.

[48] In view of this latest development, the applicants sought to amend their application for leave and the statement under O 53 r 3(2) of the Rules of Court 2012 ('the ROC'). The application to amend, which is in encl 16, was heard on 27 February 2024. This court has allowed the application in encl 16 since the Attorney General has no objection to it.

[49] In the amended application for leave, the applicants seek for the following additional reliefs:

> 6A. An order of Certiorari against the Public Prosecutor and his agents, servants, officers or otherwise, to quash the charge made against the second applicant on 23.1.2024.
>
> 6B. An Order of Certiorari against the Public Prosecutor and his agents, servants, officers or otherwise, to quash the charge made against the first applicant on 29.1.2024.

[50] Before me, learned counsel for the applicants attracted my attention to the judgment of the Federal Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 (FC). The Federal Court, in interpreting art 5(1) of the Federal Constitution, held that a person's life or his or her personal liability, in its widest sense, may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Article 5(1) provides that:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[51] Based on the said authority, learned counsel for the applicants submitted that the protection of 'personal liberty' under art 5(1) of the Federal Constitution must therefore demand speedy and fair investigations, a part and parcel of the criminal procedure. Learned counsel then referred me to the judgment of the Supreme Court of India in *Vakil Prasad Singh v State of Bihar* [2009] INSC 156 SC. The Supreme Court, in interpreting art 21 of the Indian Constitution, which is in *pari materia* with art 5(1) of our Federal Constitution, held that the right to a speedy trial in all criminal prosecutions is an alienable right under art 21 of the Constitution. The apex court in India further held that the right is not only applicable to the actual proceedings in court but also includes the preceding police investigation within its sweep.

[52] Learned counsel then submitted that there was a delayed investigation some 22 years after the first applicant left public office. According to learned counsel, the protracted investigations and seizures by MACC adversely affected the applicants.

[53] Secondly, while conceding that art 145 of the Federal Constitution empowers the public prosecutor to institute or withdraw criminal charges, learned counsel for the applicants submitted that such power is not absolute. Learned counsel referred me to the judgment of the Federal Court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 (FC). The Federal Court, inter alia, held that the Attorney General *qua* public prosecutor did not have absolute or unfettered discretion under art 145(3) of the Federal Constitution to institute, conduct or discontinue any proceeding for a criminal offence. Such discretion, according to the Federal Court, was amenable to judicial review in appropriate, rare, and exceptional cases.

[54] Based on the proposition that can be distilled from *Sundra Rajoo*, learned counsel for the applicants then raised a very interesting point of law. It is this. According to learned counsel, it would follow that if the exercise of the public prosecutor's discretion to charge, prescribed in art 145 of the Federal Constitution, is, under certain circumstances, amenable to judicial review, the same prosecutorial principles should be extended to statutory investigative powers.

[55] My attention was then drawn to the recent judgment of the Federal Court in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829 (FC). The Federal Court held that given the breadth and the constitutionally entrenched rights of judicial review available to the citizenry, both constitutional and administrative, it was not tenable to construe O 53 of the ROC, a procedural rule, rigidly, and inflexibly so as to hinder or restrict the constitutionally sanctioned right of judicial review.

ANALYSIS

[56] Let me begin by stating the law in respect of an application of leave for judicial review against investigative powers. The law can be traced in the judgment of the High Court in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581. In that case, the applicants sought leave to commence judicial review under O 53 r 3 of the then Rules of the High Court 1980 ('the RHC') for an order of certiorari to quash an order dated 5 July 2004 made by the deputy public prosecutor and served on Hong Leong Bank Bhd and EON Bank Bhd ('the said orders'). The said orders purport to affect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the then Anti-Money Laundering Act 2001 ('the then AMLA'). The crucial question that needed determination was whether the said orders of the DPP pursuant to s 50(1) of the then AMLA were decision reviewable by way of judicial review.

[57] The High Court held that the order of the DPP is not reviewable under O 53 of the RHC. Section 50(1) of the then AMLA is part and parcel of the investigation process into an offence under s 4(1) of the same. In order to facilitate the investigation into the offence of money laundering, the law has provided the public prosecutor the power to assist the investigating officer.

[58] The proposition in *City Growth* was affirmed by the Federal Court in *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2018] supp MLJ 16 (FC). In that case, the enforcement officers from the Ministry of Domestic Trade and Consumer Affairs raided a factory of the appellant — a manufacturer of video compact discs — and seized machinery and equipment under the Optical Discs Act 2000 ('the ODA'). The appellant applied for judicial review for an order of mandamus to compel the second respondent to return the seized machines and equipment. The Federal Court, after having referred to *City Growth*, reiterated that such an exercise of power in the course of a criminal investigation was not open to judicial review under O 53 of the ROC.

[59] More to the point to the facts of the instant case, the Federal Court in *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2017] 5 MLJ 349 (FC) referred to both *City Growth* and *Empayar Canggih* held that the actions or decisions of a public authority, such as the MACC, in the exercise of its powers in the course of criminal investigation or enquiry were not open to judicial review. Abu Samah Nordin FCJ, in delivering the judgment of the apex court, referred to s 30(1)(a) of the MACC Act and further held as follows:

> Therefore the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review.

[60] Despite the compelling authorities on the proposition that the exercise of powers in the course of criminal investigation is not amenable to judicial review, Tan Sri Tommy Thomas, in his usual persuasive self, invited me to conclude otherwise. Learned counsel for the applicants submitted that *Empayar Canggih* and *Latheefa Beebi Koya* must be viewed in the light of *Sundra Rajoo*.

[61] With respect, we need not even need to refer to *Sundra Rajoo*. The answer, I believe, can be found in *Latheefa Beebi Koya* itself. The Federal Court in *Latheefa Beebi Koya* indicated that one way to challenge the investigative powers is to establish mala fide or bad faith on the part of the investigation officers. However, Abu Samah Nordin FCJ held that on the facts of the case, the respondents failed to establish that the notice pursuant to s 30(1)(a) was issued mala fide or in bad faith.

[62] This is, of course, in line with the judgment of the Federal Court in *Sundra Rajoo*. There, the Federal Court held that while the public prosecutor's powers are reviewable, the exercise of discretion under art 145(3) of the Federal Constitution, as a matter of policy, remains subject to a higher threshold of scrutiny.

[63] Tengku Maimun CJ, in delivering the judgment of the court, remarked that:

> In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[64] In the circumstances, even if we were to extend the ratio in *Sundra Rajoo* to the investigative powers, one must start with the connotation that such decisions are cloaked with the presumption of legality. Again, one must establish compelling prima facie evidence to challenge such decisions in a judicial review proceeding.

[65] I have gone through the first applicant's affidavit in support of this application for leave in encl 3 ('AIS3') with the proverbial toothcomb. Save for the assertion that he was perplexed and deeply disturbed with the conduct of the MACC, there was no allegation or even evidence, let alone compelling, to suggest any mala fide on the part of any of the investigation officers of the MACC in the conduct of the investigation against the applicants. The allegation of harassment, without more, does not in my considered view, amount to mala fide.

[66] As stated by the Federal Court in *Latheefa Beebi Koya*, mere suspicion or even an allegation of intimidation is insufficient. It might perhaps be open to the applicants to suggest that the circumstances surrounding the issuance of notices, the seizures of documents or even the freezing of the accounts might possibly relate to some suspicion of mala fide, but this cannot be taken for granted or considered sufficient proof by itself: see *Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279.

[67] An allegation that the notices issued by the MACC are unlawful, per se, to my mind, is also insufficient to establish mala fide. Whether or not the issuance of notices is unlawful is a mooting point. It is a matter of interpretation. On this point, there is a respectable authority to the effect that the adoption of a different interpretation of law does not amount to an error of law on the face of the record and is therefore not the basis for judicial review; see *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 53.

[68] As to whether it was proper to commence an investigation on an allegation of an offence that occurred more than twenty years ago, I am of the respectful view that the maxim of *nullum tempus occurrit regi* applies. It simply means time does not run against the Crown. That the defence of the alleged offence is stale, so to speak, is unknown to our criminal law. If at all, as demonstrated in *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111, the contention that an offence is 'stale' can only be argued as an extenuating circumstance during plea in mitigation upon conviction.

[69] In any event, even if the Anti-Corruption Act 1997 was repealed by the MACC Act, there is a saving clause in s 74(3) of the MACC Act. Section 74(3) of the MACC Act provides as follows:

> The provisions of this Act which relate solely to procedure or evidence shall apply to any offence against the law repealed under section 73 and such provisions may be used in the course of any pending investigations and in any court proceedings instituted before or after the commencement of this Act in respect of such offence.

In *Ong Lock Mui v Deputy Public Prosecutor* [1972] 1 MLJ 73, Syed Othman

J held that the rule that the effect of repealing a legislation is to obliterate it completely applies only where there are no express saving provisions in the repealing legislation. In the instant case, s 74 of the MACC Act is 'the express saving provision in the repealing legislation'. In the circumstances, the argument that the investigation against the applicants offends art 7(1) of the Federal Constitution on the protection against retrospective criminal laws is not applicable.

[70] On the allegation that the investigation against the applicants is politically motivated, I need only refer to the judgment of the Court of Appeal in *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114 (CA). In that case, the appellant was charged in the sessions court with an offence under s 97(1) of the then Banking and Financial Institutions Act 1989 of having accessed and then revealing to the media details about the personal bank accounts of certain parties on the allegation that certain corrupt practices relating to public funds in those accounts had been committed. Claiming the charge against him was, inter alia, politically motivated, the appellant applied to the High Court to exercise its inherent jurisdiction, as well as its powers under s 5 of the CPC to, inter alia, set aside the charge and acquit and discharge him. The High Court dismissed the application and the appellant appealed to the Court of Appeal.

[71] In affirming the High Court's judgment, the Court of Appeal held that there was no plausible reason for the High Court to interfere with the prosecution's duty in the criminal proceedings against him. However, it was further held that the appellant was not precluded from raising what he was alleging in his application in his defence at the trial. The issue of mala fide, if there was one, was a question of fact which had to be proved by evidence at the trial.

[72] Applying the said proposition to the instant case, my considered view is that, the allegation that the investigation against the applicant is politically motivated or that Prime Minister Anwar Ibrahim considered the first applicant as 'a political foe' should be addressed by the first applicant at the criminal trial.

ON THE AMENDED RELIEFS

[73] I now refer to the amended reliefs in paras 6A and 6B sought by the applicants to quash the separate charges under s 36(2) of the MACC Act.

[74] From the assertions made by the first applicant in AIS3, it is clear to me that the arguments centre on the substantive criminal process. In *Sundra Rajoo*, the learned Chief Justice, in delivering the judgment of the Federal Court, held that:

Put another way, if the court is satisfied that the arguments centre around the substantive criminal process then the appropriate forum would be the criminal court and not any other court.

[75] By attempting to quash the charges against them by way of this application for leave for judicial review, the first and second applicants, in effect, are mounting a collateral attack. This is a judicial review court and it should exercise great caution in allowing this collateral challenge. In *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421 (FC), the Federal Court held that:

> [The] courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of certiorari, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial.

[76] In the circumstances, since the first and second applicants had already been charged at the sessions court, it is now open for them to challenge the same through a criminal application instead of a judicial review.

FINDINGS

[77] For the reasons aforesaid, my findings are as follows:

(a) as a general rule, an exercise of power in the course of a criminal investigation is not open to judicial review under O 53 of the ROC;

(b) however, one way the applicants may challenge the criminal investigation is to establish the existence of mala fide; *Latheefa Beebi Koya*;

(c) mere suspicion of mala fide or even an allegation of intimidation is insufficient;

(d) on the facts as affirmed in AIS3, the applicants have failed to establish mala fide on the part of the investigation officers of MACC;

(e) as to the allegation that the notices issued by the MACC are unlawful, the adoption of a different interpretation of the law by the MACC does not amount to an error of law that is amenable to judicial review;

(f) the assertion that the alleged offence is stale is not a defence known in our criminal law. The maxim *nullum tempus occurrit regi* applies;

(g) in view of the saving clause in s 74(3) of the MACC Act, art 7(1) of the Federal Constitution does not apply;

(h) likewise, in view of the facts available before the court, it is impossible for the court to impose a time limit required for the investigation. In any event, the first and second applicants were already charged before the Sessions Court, Kuala Lumpur;

(i) the issue of the allegation that the investigation and eventual prosecution of the first and second applicants is actuated by political motives should be addressed at the criminal trial;

(j) the attempt to quash the prosecution of the first and second applicants at the sessions court should be made by way of a criminal application, not by way of a judicial review;

(k) even if this court were to refer to *Sundra Rajoo* and extend the proposition to the investigation process, the two-step threshold for leave stated therein is higher than an ordinary application for leave; and

(l) the applicants have failed to establish with compelling evidence and prima facie proof that the decision or omission of the MACC's investigating officers falls within the traditional grounds of judicial review. In short, the threshold is not crossed.

[78] Since the applicants have failed to establish mala fide, this application for leave for judicial review must fail. The general position that the exercise of function in relation to criminal investigation is not amenable to judicial review, as stated in *Empayar Canggih* and *Latheefa Beebi Koya*, prevails.

[79] There is no arguable case disclosed in favour of granting the relief sought at the substantive hearing if leave is granted. The grant of leave under the circumstances would be an exercise in futility: see *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 (FC).

[80] The application for leave is refused. In view of my finding, the relief sought in prayer B for an order of stay is equally refused.

[81] There shall be no order as to costs.

Application for leave dismissed.

Reported by Ashok Kumar